

JUL 23 1993

No. 92-2038

Supreme Court of the United States

OCTOBER TERM, 1993

ASGROW SEED COMPANY,

Petitioner,

v.

**DENNY WINTERBOER and BECKY WINTERBOER,
D/B/A DEEBEES,**

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF AMICUS CURIAE
INTELLECTUAL PROPERTY OWNERS
IN SUPPORT OF THE PETITIONER**

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
OF INTELLECTUAL PROPERTY OWNERS
IN SUPPORT OF THE PETITIONER**

Intellectual Property Owners (IPO) moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari. The respondent has refused consent.

IPO is a broadly-based association with members in nearly all major industries. IPO believes the information and views presented in IPO's proposed brief would be useful to the Court as a supplement to the petition for certiorari. Although in agreement with the petitioner's analysis, IPO's proposed brief makes additional arguments. These include: (1) the Court of Appeals interpretation is inconsistent with traditional notions of exclusive rights in U.S. patent, copyright, and trademark law, (2) the

ruling of the Court of Appeals is inconsistent with the International Convention for the Protection of New Varieties of Plants, and (3) the ruling of the Court of Appeals may impede implementation of the North American Free Trade Agreement.

IPO believes its proposed brief would assist this Court in understanding how the case affects the U.S. economy and U.S. and international intellectual property protection.

Respectfully submitted,

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QUESTIONS PRESENTED

Amicus curiae, Intellectual Property Owners (IPO), adopts the questions presented by petitioner Asgrow Seed Company. The questions presented are:

“(1) Whether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 permits up to half of a farmer’s crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety?”

“(2) Whether the seed sales authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed being sold is a protected novel variety?”

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Members of the Board of Directors of Intellectual Property Owners	1a

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INTEREST OF THE AMICUS CURIAE

Intellectual Property Owners (IPO) files this *amicus curiae* brief in support of the petition of Asgrow Seed Company for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit entered December 21, 1992.

IPO is a nonprofit association that promotes understanding of intellectual property rights in the United States. The organization was incorporated in the District of Columbia in 1972. It is exempt from federal income tax under Internal Revenue Code § 501(c)(6). Members include nearly 100 companies and some small busi-

nesses, universities, and independent inventors who own legal rights such as patents, trademarks, copyrights, and trade secrets.

IPO members are responsible for a large portion of the research and development performed in the United States, and file thousands of patent applications a year in the United States and foreign countries to protect their R&D investments in new technology. The Plant Variety Protection Act (PVPA) extends exclusive protection similar to that available under patent law to sexually reproduced plant varieties. IPO members file for protection provided by the PVPA to protect their R&D investments in plant varieties.

IPO's members are interested in maintaining adequate and effective exclusive rights under all intellectual property statutes, including the PVPA. IPO members also are interested in the continued effectiveness of the International Convention for the Protection of New Varieties of Plants and in prompt implementation of the North American Free Trade Agreement (NAFTA). The latter agreement obligates the United States, Canada, and Mexico to provide effective legal protection for plant varieties.

ARGUMENT

I. THE COURT OF APPEALS INTERPRETATION OF THE RIGHT TO SAVE AND SELL SEED IS INCORRECT¹

A. The Court of Appeals Overlooked Parts of Section 2543

IPO agrees with petitioner's analysis of sections 2541 and 2543. The discussion below highlights errors made by the Court of Appeals in not giving meaning to all of the words of section 2543 that led the court into an incorrect interpretation of sections 2541 and 2543.

Right to Save Seed v. Crop Exemption. As revealed by its title, section 2543 covers the "right to save seed" and the "crop exemption." The bill that became the Plant Variety Protection Act originally had separate sections on the right to save seed and the crop exemption.² Before

¹ IPO will use the citation form "Pet." and a page number to refer to the petition, and the citation form "Pet. App." and a page number to refer to petitioner's appendix.

² Sec. 112. Right to Save Seed.

Except under subsections (3) and (4) of section 111, it shall not infringe any right hereunder for a person to save seed and grow the resulting variety for his own use.

Sec. 114. Crop Exemption.

It shall not be infringement to sell seed grown from the protected variety, obtained (for growing) by authority of the proprietor or by saving seed under section 112, for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose, and is in channels which are usual for that purpose and in a manner exclusively for that purpose. A purchaser who diverts such seed from those channels to growing purposes shall not be entitled to any benefit for lack of notice under section 127.

S. 3070, 91st Cong., 1st Sess. (1969). Section 2543 resembles S. 3070 more closely than it resembles the House bill quoted at Pet. 20-21, because section 114 of S. 3070 contained a sentence that corresponds to the last sentence of section 2543.

enactment, the sections were edited and combined into section 2543, with a proviso added at the end of the first sentence to permit sales of limited quantities of saved seed. This was the framework:

Portions of Sections 2543	Subject Matter
First sentence up to the proviso ³	Right to Save Seed, which limits "such saved seed" to the amount used to produce a crop on the farm
First sentence's proviso ⁴	Adds a right to sell "such saved seed" for reproductive purposes in specified circumstances
Second and third sentences ⁵	Crop Exemption, which is the right to sell a crop for non-reproductive purposes

In attempting to understand section 2543 and the relationship to section 2541, it helps to maintain the distinc-

³ "Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section."

⁴ "Provided, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable."

⁵ "A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement."

tion between the right to save seed and the crop exemption. When the Court of Appeals attached significance to the term "crop exemption,"⁶ that court overlooked the fact that Congress used the term to describe only the second and third sentences.

Relationship of sections 2543 and 2541(3). Petitioner's interpretation of the first sentence of section 2543 and paragraph (3) of section 2541 is the only interpretation that gives meaning to all words in those passages.⁷ The Court of Appeals did not understand that the proviso creates an exemption from section 2541(3) for the right to sell "such saved seed." The court said section 2543 contains "two explicit references" clarifying that farmers who save seed are subject to section 2541(3).⁸ The court overlooked "without regard to the provisions of" in the proviso.⁹

It may have been the failure of the Court of Appeals to give any meaning to "without regard to the provisions of" that led the court to attempt to reconcile sections 2541(3) and 2543 by giving an unsupported, extraordinary definition to the term "marketing" in section 2541(3).

Right of Purchasers of Brown Bag Seed to Save Seed. The Court of Appeals also overlooked a crucial phrase

⁶ Pet. App. 8a. Petitioner explains the court's error at Pet. 8, n.7.

⁷ For petitioner's explanation of the relationship of the sections, see particularly the second and third paragraphs at Pet. 19.

⁸ Pet. App. 12a.

⁹ Section 112 in the original Senate bill contained a right to save seed only for the farmer's own use. Farmers saving seed and planting it on their own farms would not run afoul of section 2541(3), so section 112 defined the right to save seed by making it apply only to activity not coming under section 2541(3). When the proviso was added giving farmers a right to sell "such saved seed," it was necessary to exempt selling of limited quantities of seed defined by the term "such saved seed" from section 2541(3).

in the first sentence of section 2543 when it concluded that "a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed."¹⁰ The sentence states that a person can save seed "produced by him from seed . . . descended from seed obtained . . . by authority of the owner" Because the Court of Appeals believed that parties who purchased brown bag seed from other parties would be unable to save seed, the court may have believed its interpretation of the remainder of section 2543 did not eviscerate the rights of plant variety owners.

If so, the court was wrong on both counts. All farmers have the right to sell "such saved seed" in accordance with section 2543, regardless of whether their seed is obtained from or descended from seed obtained from the certificate owner. All such farmers are restricted, however, to selling no more than the amount of protected seed needed to produce crops on their own farms.

B. The Court of Appeals Interpretation of Sections 2541 and 2543 Is Implausible

The Court of Appeals ruling permits up to half of a farmer's crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety. Such an inroad into the exclusive rights of an intellectual property owner is unprecedented in the history of patent, trademark, and copyright law in the United States, which dates back more than 200 years.¹¹

¹⁰ Pet. App. 6a.

¹¹ See, e.g., 35 U.S.C. § 154 (1988) (right of patent owners to exclude others from making, using, or selling inventions); 17 U.S.C. § 106 (1988) (exclusive rights of copyright owners in copyrighted works); 15 U.S.C. § 1114 (1988) (liability for unauthorized use of registered trademarks); compare 7 U.S.C. § 2483 (1988) (right of plant breeders "to exclude others"); see generally *Bicentennial of the United States Patent and Copyright Laws* (Foundation for a Creative America ed., 1991).

Indeed the patent/copyright clause of the Constitution¹² states the principle of exclusive rights for innovators.

Permitting up to half of a crop to be sold as seed is little different than permitting the purchaser of a patented computer or copyrighted video cassette to make and sell unauthorized copies. The principle is similar whether the reproduction is of protected plant varieties, patented computers, or copyrighted video cassettes. Patent and copyright laws do not permit purchasers to make even replacement copies. It is implausible that Congress would have so eviscerated the right to exclude in the PVPA without explanation. Congress did not intend for farmers to save and sell more seed than needed to produce a crop on the farm.

The ruling that sales of saved seed are not subject to the notice requirement of section 2541(6) also is implausible. Patent, copyright, and trademark laws contain no exemption from notice requirements that resembles the exemption found in the PVPA by the Court of Appeals.

The act of "dispensing" a variety "without notice as to being a protected variety" is an act other than the act of selling "such saved seed" that is given a limited exemption from infringement in section 2543. The last sentence of section 114 of the Senate bill, which became the third sentence of section 2543, imputes notice to a purchaser who improperly diverts to reproductive purposes seed that is sold in the usual channels for nonreproductive purposes. Surely Congress would not have bothered to include this imputed notice section to cover sales of a protected variety not intended to be used as seed, if at the same time Congress was exempting sales of "such saved seed" from the notice requirement without explicitly saying so.

¹² Art. I, § 8, cl. 8, "The Congress shall have power . . . To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

If brown bag sellers are permitted to sell up to half of their crop for seed without giving notice to their customers that the seed is a protected variety, the system of protecting plant varieties will disintegrate. The market for the plant variety owner will be destroyed by purchasers of brown bag seed who can sell large quantities of seed themselves because they are not on notice. It should be presumed that Congress intended a workable system for putting potential infringers on notice of their potential liability for unauthorized activity.

II. ASGROW'S INTERPRETATION GIVES MEANING TO ALL WORDS IN SECTIONS 2541 AND 2543 AND PRESERVES THE EXCLUSIVE RIGHTS THAT ARE FUNDAMENTAL TO INTELLECTUAL PROPERTY PROTECTION

The petitioner's interpretation is compatible with the framework of section 2543 and gives meaning to all words in sections 2541(3) and 2543. When meaning is given to the cross reference to section 2541(3) in the introductory clause of section 2543, the portion of section 2543 up to the proviso limits the amount of "such saved seed" that is the subject of the proviso. The proviso then sets forth rules for selling "such saved seed" for reproductive purposes. The second sentence contains the rules for selling the novel variety for other than reproductive purposes.

The proviso refers to selling "such saved seed," which is the term used earlier in the section to describe seed needed for use on the farm in the production of a crop, and which is as much seed as can ever be sold under section 2543 without infringing under section 2541(3). Section 2543 permits a farmer to avoid waste by selling "such saved seed," and it preserves the right to exclude competitors that is the cornerstone for all forms of intellectual property protection.

III. CERTIORARI IS NECESSARY TO REVIEW THE DECISION OF THE COURT OF APPEALS BECAUSE OF THE BROAD IMPACT ON THE U.S. ECONOMY AND ON INTELLECTUAL PROPERTY PROTECTION

A. The Decision Will Adversely Affect National Competitiveness

A research-based seed industry provides the same benefits to the national economy that are provided by any research-based industry protected by intellectual property rights—jobs, increased exports, and an improved standard of living. The briefs of petitioner and the American Seed Trade Association explain the effects on the seed industry. The Court of Appeals acknowledged that its ruling "could undercut much of the PVPA's incentives."¹³ Such incentives are essential to continued seed research. The statute can and should be interpreted so that its incentives are not undercut.

B. The Decision Is Inconsistent With the International Convention for the Protection of New Varieties of Plants

The United States and 20 other countries¹⁴ are members of the International Convention for the Protection of New Varieties of Plants (UPOV Convention), as revised at Geneva, on October 23, 1978.¹⁵ Article 5 of the UPOV Convention requires member countries to provide minimum rights to plant breeders. Article 5(1) provides:

The effect of the right granted to the breeder is that his prior authorisation shall be required for

¹³ Pet. App. 12a.

¹⁴ *Industrial Property* (World Intellectual Property Organization, Geneva, Switz.), Jan. 1993, at 19.

¹⁵ 33 U.S.T. 2703. The convention is commonly identified by UPOV, which is the French acronym for the union that administers the convention: Union Internationale Pour La Protection Des Obtentions Végétales.

- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative propagating material, as such, of the variety

Article 5(4) says that any member state may, under its law, grant breeders "a more extensive right than that set out in paragraph (1)" The UPOV Convention gives no indication that member states are free to grant *less* extensive rights than required by paragraph (1). The United States joined the UPOV Convention by executive agreement on the assumption that the Plant Variety Protection Act was consistent with the UPOV Convention. The ruling of the Court of Appeals, allowing competitors to produce, offer for sale, or market up to half of a crop without the breeder's authorization, creates a significant conflict with article 5(1). A court interpreting a statute that is the basis for United States adherence to an international agreement should seek to preserve the agreement.

C. The Decision May Impede Implementation of the North American Free Trade Agreement

Article 1701 of the North American Free Trade Agreement,¹⁶ signed by the President of the United States, requires the United States, Canada, and Mexico to "give effect to . . . the substantive provisions of . . . the International Convention for the Protection of New Varieties of Plants, 1978 (UPOV Convention) . . ." Article 1709 states that "each party shall provide for the protection of plant varieties through patents, an effective scheme of *sui generis* protection, or both."

Although NAFTA is not yet ratified, United States officials are proceeding on the assumption that U.S. plant

¹⁶ 32 I.L.M. 605 (signed Dec. 17, 1992).

variety protection complies with the agreement. If the Court of Appeals decision requires additional legislation to restore the intended protection for plant varieties in this country, NAFTA implementation may be complicated or the U.S. seed industry may encounter delay in obtaining protection abroad.

CONCLUSION

The decision of the Court of Appeals will have a devastating effect on plant variety protection for innovative seed companies. A grant of certiorari is requested to review the Court of Appeals analysis of sections 2543 and 2541(6) on this vital issue of national importance.

Respectfully submitted,

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ADDENDUM

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